No. 15432

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

MILDRED IRENE SIEGEL,

Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

Opinion Below.

The opinion of the Tax Court of the United States [R. 30-42] is reported at 26 T. C. 743.

Jurisdiction.

This proceeding involves federal gift tax for the calendar year 1950. A statutory notice of deficiency [R. 12-15] was mailed to respondent on February 8, 1954. Within the time and in the manner and form provided by law, respondent petitioned the Tax Court of the United States for a redetermination of that deficiency. [R. 6-15.] The decision of the Tax Court of the United States was entered October 3, 1956. [R. 42-43.] The Commissioner petitioned for review on December 20, 1956. [R. 43-45.] Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

Question Presented.

Respondent elected to take the benefits offered to her in her husband's will. In exchange for the benefits so obtained, she transferred her community property to the trust established under the will. The Tax Court held that the widow's transfer was made in consideration of the provisions offered in the will and that only the excess of her transfer over what she received was a taxable gift. The tax on this excess was determined by the Court and has been paid.

There is no conflict in the evidence. The issue is whether as a matter of law the widow received nothing whatever in money or money's worth for transferring her property to the trust.

Statute Involved.

Internal Revenue Code of 1939, Section 1002. *Transfer for Less Than Adequate and Full Consideration.*

> "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year. (26 U. S. C. 1952 ed., Sec. 1002.)"

Statement of Case.

Irving Siegel died in 1949 and was survived by a son, and by his widow, the respondent herein. The property of the parties was all community property. The husband by his will purported to dispose of the entire community property including the wife's share. Most of the property went into a trust and its income was payable to the widow for

life. The trust remainder went to the son. [R. 22-29.] The pertinent provisions of the will are as follows:

> "Eight: The provisions made in this my Last Will and Testament for my beloved wife, Mildred Irene Siegel, *are in lieu of her community rights and interest*, and if she elects to take her community interest, in lieu of taking under this my Last Will and Testament, then the bequests made to her in paragraph Three hereof shall be of no force and effect and the real and personal property so bequeathed shall become a part of the rest, residue and remainder of my said estate to be distributed to my said trustees, and likewise subdivision (a) of paragraph Seven shall be of no force and effect *and she shall take nothing* as a beneficiary under said trust." (Italics added.) [R. 28.]

The acceptance of the offer made in her husband's will filed by the widow on January 5, 1950 reads as follows:

> "Election of Widow to Take Under Will
>
> "I, the undersigned, Mildred I. Siegel, widow of Irving Siegel, deceased, do hereby elect to take under the Last Will and Testament of said deceased *in lieu of any and all community property rights which I have* in said estate." (Italics added.)
>
> "Dated this 5th day of January, 1950
>
> Mildred Irene Siegel
> (Mildred Irene Siegel)" [R. 19]

The testimony shows [R. 79-81] that prior to making the election the widow carefully considered the available choices and obtained outside advice with respect to the course of action she should pursue and only after so doing accepted the proffered bequests and the life income

in her husband's one-half of the community because in her words [R. 81] ". . . I would be very much better off taking under the will."

This case then originated with the assertion of a gift tax deficiency against respondent for 1950. [R. 12-15.] At the trial the tax demanded was reduced to $46,829.37. [R. 20, 36-37.] (Pet. Op. Br. p. 3.) This is the amount of tax which, subject to credit for the prior payment, would be due if no consideration in money or money's worth was given to the widow in exchange for the relinquishment of her property.

The difference between what the widow gave up and what she received, according to the decision below, was $74,332.55. Respondent has not challenged this determination and has paid her tax thereon. Nevertheless this disparity in the amounts exchanged came into existence only after three important issues were decided adversely to respondent. The first item charged the bequest of $35,000 against the husband's share. The second came from the failure to add the automobiles to what respondent received under the will. The final adverse ruling wholly disregarded the possible invasion of the principal of the trust. These elements are not mentioned now to affect the tax due contrary to the determination made below. Their existence, and the difficulty presented, even to the court below, in weighing them provides an obvious explanation why the widow made the deal at all, and why she thought that she had received more than she gave up and had made no gift. It is self evident that the actuarial value of the remainder set in the Tax Court's findings, was not as highly regarded by the widow as the life estate under the will which would produce a nice check every month. In no event can the difference in value, dis-

covered only after judicial construction of the will provisions, change the deal made when the election was signed and filed.

The Commissioner argues that the husband's will only provided a receptacle into which the widow's gift was placed and that some language therein may have "induced" this action; but that the will provisions have no other significance in the case.

The question is simply one of determining whether or not some rule of law exists which requires a disregard of the common sense construction of the transaction arrived at by the trial court. The view adopted by that court is essentially the same as that placed on the agreement by all of the parties at the time, namely, that the widow clearly made her election to get property of great value which was offered to her and available to her only if she would relinquish valuable property rights in her own property.

Summary of Argument and Points to Be Urged.

A. A will requiring an election extends an offer to the widow of a consideration in exchange for the rights which she is asked to relinquish.

B. The evidence shows that the widow accepted a life estate worth $159,335.43 and a bequest of $35,000 in exchange for placing her property in trust. The benefits received by the widow substantially offset her transfer and a tax is payable only on the excess value which was a gift.

C. The petitioner has not sustained his burden of showing that the trial court erred.

ARGUMENT.

A. A Will Requiring an Election Extends an Offer to the Widow of a Consideration in Exchange for the Rights Which She Is Asked to Relinquish.

It is interesting to note that the present case and *Chase National Bank,* 25 T. C. 617, upon the basis of which the present case was decided, were cases of first impression in the lower court. The use of widow's elections antedates the federal gift tax by many years. Except for a brief period a gift tax has been in effect since 1924.

No attempt was made to subject elections to gift tax for more than thirty years. Obviously long adherence to an erroneous position cannot create any vested interest in its continuance. The former position, however, may have resulted from a recognition of the substantial *quid pro quo* existing in election cases. To the extent that a failure to tax over a period of time builds an administrative construction of the law, and to the extent our analysis of this history is correct, there is a persuasive argument for the proposition that elections are not donative transactions at all.

An examination of the normal widow's election reveals that all of the elements of a regular contract are present. The first requirement, that there be an offer, is supplied by the terms of the will. Page in defining elections and their nature says:

> "The gift by will in lieu of the other right is said to be equivalent to an offer, and to offer something to the devisee in return for his property or interest."
>
> *Page on Wills* (Lifetime Ed.), Sec. 1346.

See to the same effect:

Davis v. Mather (1923), 309 Ill. 284, 141 N. E. 209;

Gowling v. Gowling (1950), 405 Ill. 165, 90 N. E. 2d 188.

It must be remembered that the terms of the will are a unilateral offer. The concepts such as bargaining negotiations and mutual promises pertain only to bilateral contracts. Williston indicates this distinction in saying: "Such statements are true only of bilateral contracts. An offer of reward, an offer of a price for goods, or for services, becomes a contract when what is requested is given or done, though no obligation to give or to do anything ever exists." *Williston on Contracts,* Sec. 13.

Mr. Siegel expressly stated that the provisions in his will for his wife were "in lieu of her community rights and interest and if she elects to take her community interest . . . she shall take nothing . . ." under the will. [R. 28.] This is clearly the language of a contract of exchange. The phrase "in lieu of" means "in the place of" or "instead of." *Webster's New International Dictionary,* (2nd Edition). The word "exchange" has as its most common meaning: "The act of giving or taking one thing in return for another regarded as an equivalent . . ." *Webster's New International Dictionary,* (2nd Edition).

Only bald assertion can read "largess" into the language just quoted where the widow was to receive nothing unless she gave up control over her property. The rights given up as her part of the bargain constituted the alleged gift. The petitioner would have us believe (Pet. Op. Br., p. 8) that the husband was only making a gift to his wife, not offering her a monetary compensation for the release by her of rights valued at $268,667.98. [R. 37.] On the

record presented, and particularly in view of the testimony of the widow, and the co-executor and co-trustee [R. 74-75, 79-81, 87-91], there is no basis whatever either in law or in fact for so distorting the plain terms of the transaction.

B. The Evidence Shows That the Widow Accepted a Life Estate Worth $159,335.43 and a Bequest of $35,000 in Exchange for Placing Her Property in Trust. The Benefits Received by the Widow Substantially Offset Her Transfer and a Tax Is Payable Only on the Excess Value.

There is no dispute upon the evidence. The life estate and bequest received by the widow have a value of $159,335.43 and $35,000 respectively. [R. 20-21, 30, 35.] The dispute concerns the proper construction of the transaction and is over the question of whether or not the widow received a valuable consideration for her transfer.

The lower court found the existence of a trade or bargain from the specification of a price in the will and the payment of it upon the election. A review of fundamental principles demonstrates that the determination is correct.

Williston has said:

> "An offer is to be known from other conditional promises only because the performance of the condition in an offer is requested as the agreed exchange or return for the promise or its performance, thereby giving the offeree a power, by complying with the request, to turn the promise in the offer into a contract or sale. . . . If the offer contemplates the formation of a unilateral contract . . . the offeror proposes to exchange his own promise for an act of the offeree. . . ."
>
> *Williston on Contracts,* Sec. 25

He continues saying:

> "If it is said then that a promise has no consideration, the meaning properly is that nothing was in fact given in exchange for the promise or that no action was taken in reliance upon it, either because the promise was intended as a gratuity or because the thing for which it was offered was not given."
>
> *Williston on Contracts,* Sec. 101.

Before making the election the widow had absolute ownership of a remainder interest valued at $268,667.98. [R. 37.] She was offered $194,335.43 if she would place her property in the trust, thus putting the remainder beyond her control. One who has just made a gift would be expected to be poorer by the amount of it. Is the respondent poorer by $268,667.98? Clearly not, for she received in return, and solely as a part of the single unitary transaction, $194,335.43 which from her view was more valuable than what she released.

Petitioner suggests that there could be no contract made or consideration demanded or received because the husband is dead. (Pet. Op. Br. p. 8.) Such a view improperly ignores the fact that the will, which contains the offer of the decedent, speaks upon his death and in his place. It is carried out by the executors and trustees who will retain in a representative capacity for the decedent the consideration released by the widow.

> ". . . if the promisee parts with something at the promisor's request, it is immaterial whether the promisor receives anything, and necessarily involves the conclusion that the consideration given by the promisee for a promise need not move to the promisor, but may move to any one requested by the offer."
>
> *Williston on Contracts,* Sec. 113.

The election transaction has long been treated as one of purchase or exchange in cases over the country dealing with abatement of legacies. The rule that legacies acquired for value do not prorate with all legacies but are preferred is explained by Page as follows:

> "This result is also justified upon the theory that the legatee for value is a purchaser and not merely the recipient of a gift."
>
> *Page on Wills,* Sec. 1501.

> "One of the more common types of legacy for value is a legacy in lieu of dower, which is generally given priority over other legacies if the assets are insufficient to pay them in full."
>
> *Page on Wills,* Sec. 1502.

A leading case so holding is *Muse v. Muse* (1947), 186 Va. 914, 45 S. E. 2d 158, 2 A. L. R. 2d 603. In the annotation at page 610 of the *American Law Reports* following the *Muse* case, the rule is stated as follows:

> "Although there are cases . . . (to the contrary), the weight of authority is that since it (the election) is in consideration of an existing legal right, it constitutes the widow a purchaser for value and for that reason is entitled to priority over other general legacies or devises to volunteers of the testator's bounty, which must abate in the widow's favor."

Petitioner, however, may argue that even if there were bargaining and consideration in the usual sense, there was no consideration which may be taken into account in a tax case. A suitable answer to this challenge is found in the words of Judge Sibley in *Title Guarantee Loan & Trust Co. v. Comm.* (C. C. A. 5th 1933), 63 F. 2d 621, aff'd 290 U. S. 365, 54 S. Ct. 221. This was an income tax

case. At pages 622 and 623 the judge said respecting a widow's election:

> ". . . at the death of her husband this widow had a legal estate in dower . . . and the will in effect made an offer to purchase these from her in consideration of what it gave her; and that in electing to take under the will she took as a purchaser for value and not as a volunteer. . . . For the sale of her legal rights in her husband's estate she was paid in full by the equitable estate received under the will . . . in the case at bar there was . . . an exchange of legal estates for an equitable estate in an investment."

Most of the cases cited are from common law jurisdictions and involve elections in lieu of dower. Ordinarily dower is only an expectancy. In contrast, a widow's community property interest, certainly after the husband's death, is vested, and, subject only to administration, is an absolute ownership interest. When a release of a mere expectancy such as dower is sufficient to complete a contract and is treated as a transfer for consideration, obviously an actual conveyance of a vested absolute title in a community property jurisdiction is entitled, if possible, to a more favored treatment. That this would be the rule in California is strongly suggested by *Flanagan v. Capital National Bank* (1931), 213 Cal. 664, 3 P. 2d 307; and *Estate of Wyss* (1931), 112 Cal. App. 487, 297 Pac. 100.

This Court passed upon a similar question in *Wells Fargo Bank (Estate of Gibson) v. U. S. A.* (C. C. A. 9th 1957), ... F. 2d ....., 57-1 USTC. Para. 9653. The Court, in commenting upon the decision in *Lehman v. Comm.* (C. C. A. 2d 1940), 109 F. 2d 99, shows that, in an election case, the husband is the indirect creator of the trust into which he has for a consideration procured a

contribution of property by the wife. The person supplying the property is the real donor to the value of what he provides. *Augustus E. Staley* (1940), 41 BTA 752, Acq. 1942-1 CB 15.

In no event, even on a technical approach, can she be taxed on more than she gave up and the decision below so holding merits the approval of this court. *Estate of Sarah A. Bergan* (1943), 1 T. C. 543, Acq. 1943 C. B. 2.

C. The Petitioner Has Not Sustained His Burden of Showing That the Trial Court Erred.

The petitioner asserts that the trial court did not distinguish properly between legal consideration and motivation, citing *Philpot v. Gruninger* (1871), 81 U. S. 570, 20 L. Ed. 743. There, in an action on a note, the defense of failure of consideration was offered. On conflicting facts the jury held for the plaintiff. The lower court was affirmed. It was held that since the triers of the facts had found that the parties hadn't bargained for the alleged consideration, errors claimed respecting the defense of failure of consideration did not provide grounds for a reversal.

In our case the facts have been found against petitioner. The plain meaning of the words in the will and the acts called for and performed permit no other reasonable construction but that the widow's transfer was in consideration of her husband's grant of benefits. The learned text writers and numerous courts cited above all reached the same conclusion on similar facts.

When petitioner speaks of the lack of bargaining by the decedent, the largess of the decedent, and the failure of the decedent to regard the act called for as consideration (Pet. Op. Br. pp. 8-9) he cites no language in the will nor any

testimony or other matter in the record to support his allegations. Petitioner misconceives his position. It is his duty on appeal to affirmatively support his allegations of error. If in fact the record is silent, which respondent does not admit, all presumptions in the absence of some contradiction in the record are in favor of the judgment being attacked on appeal. *Grace Bros. Inc. v. Comm.* (C. C. A. 9th 1949), 173 F. 2d 170; *McCarthy Co. v. Comm.* (C. C. A. 9th 1935), 80 F. 2d 618.

Petitioner cites and relies upon five additional cases to establish his points about consideration and elections. A brief reference to each will show that they are not in point.

Warner v. Comm. (C. C. A. 2nd 1933), 66 F. 2d 403, *cert. den.* 290 U. S. 688 involved the levy of an income tax on an annuity paid to a widow who had elected to take under a will. The value of the dower interest which she gave up was less than her annuity and she had recovered her "cost." The court held only that the excess she received over the consideration she paid was not obtained by a purchase but was a bequest.

In *Fire Insurance Ass'n v. Wickham* (1891), 141 U. S. 564, the court held that parol evidence was admissible to vary a written contract to show the parties had not in fact bargained for a particular item as consideration.

The court held in *Comm. v. McLean* (C. C. A. 5th 1942), 127 F. 2d 942, that a taxpayer claiming two trusts were created in consideration of each other had the burden of offering evidence in support of the contention. Also when all of the facts concerning the transaction were exclusively in his knowledge and possession and no evidence was offered on the point, his silence would be construed against his position.

The evidence in *Giannini v. Comm.* (C. C. A. 9th 1945), 148 F. 2d 285 *cert. den.* 326 U. S. 730, showed that the individual who in the trial was claimed to have put property in a trust in consideration of a much larger contribution by his parents had, in a contemporaneous writing, accepted the "gift" from his parents.

The petitioner's citation from *McFarland v. Campbell* (C. C. A. 5th 1954), 213 F. 2d 855, is admittedly *dicta*. It seems to us, however, from a reading of the opinion that its purport is that you need a *quid pro quo* to raise an election situation, and that if a benefit had been offered and in return an immediate transfer or relinquishment had occurred, a true election would have been present.

Conclusion.

No case cited by petitioner is authority either by direct holding or in *dicta* for the proposition that to the extent that the considerations on both sides of the usual election transaction balance, a gift occurred instead of an exchange. The Tax Court has twice held against petitioner on logical and equitable reasoning. This court should affirm the decision so holding in the present proceedings.

Respectfully submitted,

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